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Supreme Court, U.S.
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No. 91-1017

In the

Supreme Court of the United States

OCTOBER TERM, 1991

REGINALD H. HOWE,
PETITIONER,

v.

GOLDCORP INVESTMENTS LTD., ET AL.,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a district court has the legal power to dismiss a complaint brought against foreign defendants, purporting to contain claims, *inter alia*, under foreign law, the Securities Exchange Act of 1934 and the Investment Company Act of 1940, for *forum non conveniens*.

2. Whether the Court of Appeals correctly determined that the district court did not abuse its discretion by dismissing this action for *forum non conveniens*.

PARTIES TO THE PROCEEDING

APPELLEES IN THE COURT OF APPEALS AND RESPONDENTS IN THIS COURT

Goldcorp Investments Ltd.
CSA Management Ltd.
David Sidney Beatty
Sidney Frank Chapman
John Cameron Gray
Robert Ross McEwen
James Randolph Mullins
James Douglas Norris
Donald Haldenby
Robert Peter Simon
Dickenson Mines Ltd.
Kam-Kotia Mines Ltd.
Wharf Resources Ltd.
John O. Kachmar
Douglas A. Sloan
Tory, Tory, DesLauriers & Binnington
Charles F. Scott
James E. A. Turner
RBC Dominion Securities Inc.

APPELLANT IN THE COURT OF APPEALS AND PETITIONER IN THIS COURT

Reginald H. Howe

RULE 29.1 CORPORATE DISCLOSURE STATEMENT

Defendants Goldcorp Investments Ltd., CSA Management Ltd., Dickenson Mines, Ltd., Kam-Kotia Mines, Ltd., Wharf Resources Ltd. and RBC Dominion Securities, Inc. state pursuant to Rule 29.1 of the Rules of the Supreme Court of the United States that Evanachan, Ltd. is the parent company of CSA Management, Ltd.; CSA Management, Ltd. is the parent company of Goldcorp, Inc. (formerly Goldcorp Investments, Ltd.), Goldfund, Ltd., and Goldtrust; Goldcorp, Inc. is the parent company of Dickenson Mines, Ltd. and Kam-Kotia Mines, Ltd.; Dickenson Mines, Ltd. and Goldcorp, Inc. are the parent companies of Wharf Resources, Ltd.; Dickenson Mines, Ltd. is the parent company of Goldquest Exploration, Inc.; and RBC Dominion Securities, Inc. is a subsidiary of the Royal Bank of Canada.

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner Reginald H. Howe ("Howe") brought this case *pro se* on behalf of a purported class of plaintiffs, over two thirds of whom are Canadian, against five Canadian companies, ten Canadian officers and directors of those companies, a Canadian law firm and two Canadian lawyers, alleging twelve

causes of action arising from events which primarily occurred in Canada, including causes of action under, *inter alia*, the Ontario Business Corporation Act, the Securities Exchange Act of 1934, and the Investment Company Act of 1940. The district court, after reviewing the strong factual connections with Canada and affidavits by prominent Canadian legal scholars demonstrating that Canada offered Howe the opportunity to obtain substantially the same relief he sought here, accepted a magistrate's recommendation and dismissed the action for *forum non conveniens*. The Court of Appeals affirmed. Howe now petitions this Court to review this fact-intensive case on certiorari. Respondents respectfully submit that his petition should be denied.

1. Background.

Howe is a United States citizen residing in Massachusetts. However, Howe purchased his shares at issue in Goldcorp Investments, Ltd. ("Goldcorp") through a Canadian broker, and holds them in a Canadian street name. AA.I. 129.[1] Indeed, it is conceded that the only place Goldcorp shares can be purchased is in Canada, and that Goldcorp stock is not traded in the United States. A. 3a. At least two thirds of the class of shareholders which Howe purports to represent are Canadian. AA.I. 53, 128-29.[2]

The complaint arises, almost exclusively, from events which occurred in Canada. Specifically, Howe asserts that in 1987 Goldcorp failed to disclose material facts in connection with proxy materials that were prepared, printed and mailed in

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[1] This response cites to the appendix attached to Howe's petition as A. . It cites to the appendix in the First Circuit, which was contained in three volumes, as AA.I., AA.II., or AA.III., as appropriate.

[2] The putative class consists of all persons who owned or purchased Class A shares of Goldcorp on or after May 4, 1987 and who sold them after March 13, 1989.

Canada, recommending that its stockholders vote at a stockholders' meeting in Canada (which Howe attended) to remove a limitation in Goldcorp's by-laws restricting Goldcorp's ability to invest in any one company. AA.I. 18-20.

Howe further alleges that Goldcorp's directors improperly approved, at meetings held in Canada, Goldcorp's acquisition in 1989 of two other Canadian companies, Dickenson and Kam-Kotia. A. 15a; AA.I. 26. Goldcorp acquired those two companies as a so-called "white knight," in the face of a hostile bid from yet another Canadian company, Corona Corp. Based on this nucleus of facts, Howe alleges causes of action under the Ontario Business Corporation Act, the Exchange Act, the Investment Company Act of 1940,[3] Massachusetts' statutory law, and RICO, as well as actions for common law breach of fiduciary duty and fraud.

Defendants timely moved to dismiss the action for failure to state a claim and for *forum non conveniens*. All defendants other than Goldcorp also moved to dismiss for lack of personal jurisdiction.

Defendants submitted extensive affidavits in support of their motion to dismiss for *forum non conveniens*, demonstrating without contradiction that, among other things, virtually all witnesses and relevant documents were located in Canada, including a host of crucial non-party witnesses, who held important documents in their possession. AA.II. 42-43. Defendants' affidavits also demonstrated without contradiction or dispute that American courts had no legal power to compel these important third party witnesses to testify, or to produce the documents within their possession. Fed. R. Civ. P. 45(b)(2).

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[3] Goldcorp has not been at any relevant time an "Investment Company" as the term is defined by the Investment Company Act. 15 U.S.C. § 80a-3(a). Moreover, even if Goldcorp had been an Investment Company, as a Canadian company, Goldcorp never engaged in any conduct placing Goldcorp within the regulatory scope of the Act. A.I. 2a-5a; AA.I. 156-58, 228-39.

In addition, defendants submitted expert affidavits from two Canadian legal scholars specializing in securities law matters, Stanley M. Beck[4] and Philip Anisman,[5] demonstrating that Canada provides remedies for securities and investment infractions that are at least as broad as those invoked by Howe under United States law. Mr. Beck and Mr. Anisman agree that Canada's so-called "oppression" remedy is "the broadest, most comprehensive and most open-ended shareholder remedy in the common law world." AA.I. 94, 122.

2. The Decisions Below.

Weighing all the relevant factors identified in this Court's decisions in *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947) and *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235 (1981), the magistrate recommended that defendants' motion to dismiss for *forum non conveniens* be granted. A. 31a-37a. Howe appealed to the district court, which adopted the magistrate's recommendation. A. 25a-30a. Howe then appealed the district court's decision to the United States Court of Appeals for the First Circuit.

The Court of Appeals affirmed the district court, holding that: (i) federal courts possess the power to invoke the *forum non conveniens* doctrine in a private action containing a claim under the American securities laws, and (ii) it was no abuse of discretion for the district court to invoke the doctrine of *forum non conveniens* in this case. *Howe* v. *Goldcorp Investments, Ltd.*, 946 F.2d 944, 945 (1st Cir. 1991), A. 1a-24a.

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[4] Mr. Beck is the former Chairman of the Ontario Securities Commission, regarded as Canada's counterpart of the Securities and Exchange Commission, and is a former Dean of the Osgoode Law School, located in Toronto. AA.I. 121-22.

[5] Mr. Anisman is a prominent Toronto barrister and solicitor, and a former professor of law at the University of Western Ontario and Osgoode Law School. AA.I. 108-16.

Applying *Piper Aircraft* and *Gilbert*, the court found that the events giving rise to the complaint occurred in Canada, Howe purchased his securities in Canada, most of the witnesses and evidence were in Canada, twelve potential witnesses could not be compelled to testify in the United States, a trial in Canada would not deprive Howe of relevant legal advantages because a Canadian court would either apply American law or Canadian laws offering the equivalent protections, and that the action addressed matters primarily of concern to Canadians. A. 14a-20a. Observing that the balance of conveniences favored "with unusual strength" a Canadian forum, the Court of Appeals affirmed the decision below. A. 15a.

In spite of Howe's assertion to the contrary, the Court of Appeals did not hold that the Investment Company Act does not apply to the redistribution in the United States of the publicly traded shares of foreign closed-end investment companies. Petition at 22. The Court of Appeals did, however, observe that "the district court could properly dismiss this [Investment Company Act] claim along with the others, for we do not see how the Act could entitle Mr. Howe to any relief beyond that which he would obtain simply by prevailing on the other claims in his complaint." A. 21a.[6]

REASONS FOR DENYING THE PETITION

There simply is no "special and important reason" to grant certiorari in this case. The opinion of the Court of Appeals for the First Circuit is precisely the type of fact-intensive, case-specific decision which this Court frequently has emphasized

[6] Indeed, Howe conceded at oral argument before the Court of Appeals that (in the words of that court) "the addition of his Investment Company Act claims did not 'in substance' make a significant difference, for, in respect to damages, it seems but a longer and more tortuous road leading to the same Rome." A. 22a.

does not merit certiorari review. Howe's assertion that the decision implicates issues on which there is a split among the circuits, or between this Court and the Court of Appeals for the First Circuit, is flatly without merit. The decision below agrees with the only other relevant appellate decisions and is fully in keeping with this Court's precedents.

I. The Circuits Agree: Securities Actions Can Be Dismissed for *Forum Non Conveniens*.

Howe suggests that this Court should accept certiorari to resolve a purported conflict in the circuit courts on the issue of whether complaints alleging causes of action under the federal securities laws can be dismissed for *forum non conveniens* in favor of a foreign forum.

No conflict exists. The First Circuit is the only court of appeals to have explicitly decided whether federal courts may dismiss federal securities actions for *forum non conveniens*. The Court of Appeals for the Second Circuit has not expressly ruled on the argument Howe asserts here, but the Second Circuit has plainly indicated that the doctrine of *forum non conveniens* may be invoked in securities cases. *Leasco Data Processing Equipment Corp.* v. *Maxwell*, 468 F.2d 1326, 1344 (2d Cir. 1972) (applying *forum non conveniens* analysis to federal securities case before concluding that dismissal in favor of foreign forum was inappropriate in that particular case); *Schoenbaum* v. *Firstbrook*, 405 F.2d 200, 209 n. 5, *modified on other gds.*, 405 F.2d 215 (2d Cir. 1968) (*en banc*), *cert. denied*, 395 U.S. 906 (1969) (suits under the Securities Exchange Act are subject to *forum non conveniens* dismissal if "the wrong alleged also constitutes the basis for a cause of action under foreign law."). No other circuit has considered the issue, even in *dicta*.

Moreover, in three decisions, district courts have dismissed securities cases for *forum non conveniens*, *DeYoung* v. *Beddome*, 707 F. Supp. 132, 137-40 (S.D.N.Y. 1989); *Diatronics, Inc.* v. *Elbit Computers, Ltd.*, 649 F. Supp. 122, 127-30 (S.D.N.Y. 1986), *aff'd without opinion*, 812 F.2d 712 (2d Cir. 1987); *Winex Ltd., et al.* v. *Paine, et al.*, No. 89-2083 (E.D. Pa., Aug. 15, 1990) (LEXIS 10834, at *12-13), while in three other decisions, district courts have indicated that they would do so under appropriate circumstances. *Fidenas Ag* v. *Compagnie International*, 606 F.2d 5, 6 (2d Cir. 1979) (observing that court below found *forum non conveniens* argument "persuasive" in dismissing securities action); *CL-Alexander's Laing and Cruickshank* v. *Goldfeld*, 709 F. Supp. 472, 480-81 (S.D.N.Y. 1989) (denying motion for *forum non conveniens* after weighing public and private interest factors in case involving Securities Exchange Act claims); *Dept. of Economic Development* v. *Arthur Andersen and Co.*, 683 F. Supp. 1463, 1483-86 (S.D.N.Y. 1988) (same).

In arguing that a conflict exists on the issue, the most support that Howe can proffer are two older district court opinions which he claims accept his theory. Conflicts between appellate and district court decisions do not, of course, justify grants of certiorari. Sup. Ct. R. 10.1(a). *See also Layne & Bowler Co.* v. *Western Well Works*, 261 U.S. 387, 393 (1923). Moreover, Howe's two cases scarcely create a conflict. The language Howe cites in the first is merely *dicta*, *Securities and Exchange Commission* v. *Wimer*, 75 F. Supp. 955, 963 (W.D. Pa. 1944), while the second district court opinion adopted, with virtually no analysis, the position that *forum non conveniens* does not apply to federal securities claims, but then inconsistently stayed the case in favor of a Canadian arbitration proceeding. *Pioneer Properties, Inc.* v. *Martin*, 557 F. Supp. 1354, 1362, 1366

(D. Kan. 1983), *appeal dismissed*, 775 F.2d 888 (10th Cir. 1985).[7]

A *per se* rule that complaints containing federal securities claims may not be dismissed for *forum non conveniens* is not the law, and should not be the law. The doctrine of *forum non conveniens* is a salutary principle, allowing a federal court to decline to exercise jurisdiction over a case when:

> an alternative forum has jurisdiction to hear the case, and when trial in the plaintiff's chosen forum would "establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience" or when the "chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems."

Kempe v. *Ocean Drilling and Exploration Co.*, 876 F.2d 1138, 1141 (5th Cir.), *cert. denied*, 493 U.S. 918 (1989) (quoting *Koster* v. *Lumbermens Mutual Casualty Co.*, 330 U.S. 518, 524 (1947)). *See generally, Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235 (1981). This Court has identified a series of "private" and "public" interest factors that courts should consider in determining whether a case should be dismissed for *forum non conveniens*. *Piper Aircraft Co.* v. *Reyno*, 454 U.S. at 241; *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 508-09 (1947).

As the First Circuit recognized here, the blanket elimination of the doctrine of *forum non conveniens* from federal securities cases would require courts to expend their judicial resources on cases that manifestly belong elsewhere, even when it would be clearly unfair to try them here. In this case, for example,

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[7] It is unclear why Howe cites Justice White's dissent in *Leroy* v. *Great Western United Corp.*, 443 U.S. 173, 188-89 (1979) or this Court's decision in *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 156 (1976). Neither case has any relevance to the issue of whether federal securities law actions may be dismissed for *forum non conveniens*.

it is undisputed that crucial third party witnesses and their documents would be unavailable to defendants if the case were tried in Massachusetts — yet Howe suggests that, because he has pleaded causes of action under the federal securities laws, the district court was not empowered to dismiss the complaint in favor of another forum. There is no reason to adopt such a simplistic rule. Indeed, given the broad jurisdictional reach of the securities laws, *Consolidated Gold Fields PLC* v. *Minorco, S.A.*, 871 F.2d 252, 261-63 (2d Cir. 1989), *forum non conveniens* provides a necessary and important mechanism that American courts can use to avoid deciding cases which should be decided abroad.

II. *National City Lines* Supports The Decision Below.

Howe also suggests that the decision below conflicts with *United States* v. *National City Lines, Inc.*, 334 U.S. 573 (1948) ("*National City Lines I*"), which he argues stands for the proposition that causes of action arising under federal statutes containing "special venue" provisions may not be dismissed for *forum non conveniens*. Petition at 12-14. *National City Lines I*, in fact, stands for no such proposition. Indeed, shortly before it decided *National City Lines I*, this Court affirmed dismissal of a special venue case for *forum non conveniens*. *Koster* v. *Lumbermens Mutual Casualty Co.*, 330 U.S. 518 (1947) (affirming *forum non conveniens* dismissal of action brought under 28 U.S.C. § 112 (recodified as 28 U.S.C. § 1401)). Lower courts, too, have invoked *forum non conveniens* in cases with special venue statutes. *See, e.g., Lockman Foundation* v. *Evangelical Alliance Mission*, 930 F.2d 764, 769 (9th Cir. 1991) (federal copyright action); *Kempe* v. *Ocean Drilling and Exploration Co.*, 876 F.2d 1138, 1144 (5th Cir.), *cert.*

denied, 493 U.S. 918 (1989) (RICO); *Transunion Corp.* v. *Pepsico, Inc.*, 811 F.2d 127, 129-30 (2d Cir. 1987) (RICO).[8]

National City Lines simply held that, based on a careful review of the particular judicial and legislative history of the Clayton Act, Congress affirmatively expressed its intention that Clayton Act cases not be subject to *forum non conveniens* dismissal. *National City Lines*, 334 U.S. at 580-87.[9] There is absolutely no such history for the federal securities laws, A. 9a-10a, and the general rule, followed by the Court of Appeals below, that such cases are subject to *forum non conveniens* is completely proper.[10]

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[8] It bears emphasizing that there are over 300 "special venue" statutes among sections of the United States Code not in Title 28. American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts*, Appendix F (1969). Howe's *per se* rule, if adopted, would have a sweeping impact indeed.

[9] As the citations at page 14 of the Petition illustrate, the courts have split on the question of whether *forum non conveniens* is available in Jones Act cases. That dispute turns on the particular nature of that statute, however, and is not implicated in this case.

[10] Howe quotes out of context the language in the Court of Appeal's decision below, noting that *National City Lines I* was overruled by *United States* v. *National City Lines*, 337 U.S. 78, 84 (1949) ("*National City Lines II*"). Petition at 13. The Court of Appeals simply noted that *National City Lines II* overruled *National City Lines I* to the extent the earlier case applied to domestic transfers. The court went on to note that *National City Lines II*, and Congress' enactment of § 1404(a), underlined a Congressional policy favoring transfers — undermining the legal fiction Howe espouses that, every time Congress adopts a special venue provision, Congress means to preclude application of the doctrine of *forum non conveniens*. A. 11a-12a. In any event, the court's discussion of *National City Lines II* merely provides an alternative basis for the court's rejection of Howe's argument that *National City Lines I* bars consideration of the *forum non conveniens* doctrine in "special venue" cases. A. 11a-12a.

III. The Appeals Court's Weighing of the *Forum Non Conveniens* Factors Does Not Pose A Special and Important Issue Worthy of this Court's Review.

Howe's "Statement of Questions Presented" asks this Court to accept certiorari to determine whether a suit brought by an American citizen can be dismissed for *forum non conveniens*. This Court has already answered that question in the affirmative. *Piper Aircraft*, 454 U.S. at 256 n. 23. *See also Mizokami Bros. of Ariz. Inc.* v. *Baychem Corp.*, 556 F.2d 975 (9th Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978) (dismissing an action brought by an Arizona company in its home forum in favor of Mexico) (cited by this Court with approval in *Piper Aircraft*, 454 U.S. at 256 n.23); *Pain* v. *United Technologies Corp.*, 637 F.2d 775 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981) (dismissing wrongful death action brought by an American citizen to recover for the death of her son, also an American citizen, in favor of Norwegian forum) (cited by this Court with approval in *Piper Aircraft*, 454 U.S. at 256 n.23).[11] Applying this Court's analysis in *Piper*, lower courts in a number of instances have dismissed cases brought by Americans in favor of foreign fora under the doctrine of *forum non conveniens*.[12] Indeed, it is not clear that the issue even arises

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[11] *Piper Aircraft* states the general rule: "[a] citizen's forum choice should not be given dispositive weight, however. [citations omitted] Citizens or residents deserve somewhat more deference than foreign plaintiffs, but dismissal should not be automatically barred when a plaintiff has filed suit in his home forum. As always, if the balance of conveniences suggests that trial in the chosen forum would be unnecessarily burdensome for the defendant or the court, dismissal is proper." *Id.* at n.23. The courts below followed *Piper Aircraft* in dismissing this action. A. 13a-20a, 33a-35.

[12] *E.g.*, *Lockman Found.* v. *Evangelical Alliance Mission*, 930 F.2d 764, 767 (9th Cir. 1991) (American plaintiff's claim dismissed for *forum non conveniens*); *Kryvicky* v. *Scandinavian Airlines System*, 807 F.2d 514, 515 (6th Cir. 1986) (action by American resident dismissed for *forum non conveniens*); *Overseas Nat. Airways* v. *Cargolux Airlines Inter.*, 712 F.2d 11, 14 (2d Cir. 1983); *Cheng* v. *Boeing Co.*, 708 F.2d 1406 (9thg Cir.), *cert. denied*, 464 U.S. 1017 (1983) (action including American plaintiffs dismissed for *forum non conveniens*); *Diatronics* v. *Elbit Computers, Ltd.*, 649 F. Supp. 122,

in this case: Howe has chosen to sue as a class representative. Accordingly, his choice of forum merits little deference. *Koster* v. *Lumbermens Mutual Casualty Co.*, 330 U.S. 518, 524 (1947).

The text of Howe's petition, however, suggests that Howe actually is asking this Court to take certiorari in order to review the lower courts' weighing of the *forum non conveniens* factors. A trial court's dismissal of an action for *forum non conveniens* will only be overturned if the court has committed "a clear abuse of discretion." *Piper Aircraft*, 454 U.S. at 257. Howe's proposed reviewing by this Court of the lower court's determination that the district court did not abuse its discretion is precisely the type of dispute that is case specific and of no public importance, not warranting the attention of this Court. *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 74, 79 (1954) (certiorari is appropriate only in cases posing issues of importance to the public, as distinguished from the specific parties); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").[13]

Moreover, no "clear abuse" occurred here. The courts below properly determined that Canada offered Howe comparable substantive relief to that offered by United States courts.[14] The courts below properly recognized that the case was brought on behalf of a putative class composed of Canadians against Canadians, arising out of events that primarily occurred in Canada, alleging causes of action expressly arising under, or

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127-30 (S.D.N.Y 1986), *aff'd without opinion*, 812 F.2d 712 (2d Cir. 1987) (securities action brought by American corporation dismissed for *forum non conveniens*). If, as Howe implies, the elderly decision in *Leasco Data* states a different rule, it has been overruled by this Court's decision in *Piper Aircraft*.

[13] *See also Labor Board* v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 503 (1951); *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949).

[14] Howe does not imply that he will, personally, be unable to attend a trial in Canada. Indeed, his complaint as amended refers to meetings that he attended in Canada. AA.I. 20-23, 31.

(as in the breach of fiduciary duty claims) clearly turning upon Canadian law, and involving evidence located in Canada and unavailable in the United States. The courts below correctly recognized that Canada's interest in resolving the dispute exceeded the United States' interest, and that the private interests of the litigants suggested the case should be tried in Canada. A. 13a-20a, 25a-37a. The courts below thus appropriately determined that the factors identified in *Gilbert* and *Piper Aircraft* strongly pointed toward dismissal on *forum non conveniens* grounds. Defendants respectfully submit that the conclusion reached by the courts below does not constitute an abuse of discretion, but rather was eminently correct.

Howe suggests, however, that the district court erred in dismissing the case because Canada does not permit lawyers to take cases on a contingency fee basis, and may require the losing party to pay the successful party's attorneys' fees. This Court, however, previously has recognized that those circumstances do not bar *forum non conveniens* dismissal. *Piper Aircraft Co.*, 454 U.S. at 251-52 and n.18 (dismissing suit on *forum non conveniens* grounds in favor of Great Britain, which does not permit contingent fee arrangements, and requires the losing party to pay the prevailing party's legal fees). In fact, the rule that the losing party compensate the victor for his attorney fees should encourage Howe to sue in Canada — if he believes his action truly has merit.

Finally, Howe contends that dismissal was inappropriate because he cannot bring a class action in Canada. Respondents have demonstrated without contradiction that class actions are available in Canada, either *per se* or through mechanisms not explicitly labelled as class actions. A.I. 105-107. Howe never disputed this latter fact.[15]

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[15] Howe's argument also rings hollow because he would have difficulty bringing a class action even in the United States: as a class member, Howe probably cannot also serve as the class representative. *Shroder* v. *Suburban*

IV. None of the Decisions Below Addressed, Or Needed to Address, Howe's Investment Company Act Issue.

Howe also asks this Court to accept certiorari to resolve a complex issue arising under the Investment Company Act. The issue, however, was never reached (and was not required to be reached) by any of the decisions below and, accordingly, a grant of certiorari is inappropriate. *Upjohn Co.* v. *United States*, 449 U.S. 383, 394 n.3 (1981) (refusing to decide an issue not passed upon by the court of appeals); *Combs* v. *United States*, 408 U.S. 224, 227 n.4 (1971) (same); *Bivens* v. *Six Unknown Fed. Narcotic Agents*, 403 U.S. 388, 397-98 (1970) (same); *McCullough* v. *Kammerer Corp.*, 323 U.S. 327, 328 (1945) (dismissing writ of certiorari, in part, because question presented was not passed upon below).

The district court (and, accordingly, the Court of Appeals) did not reach defendants' motion to dismiss the Investment Company Act claim and, accordingly, did not confront the issue Howe raises here. Instead, the Court of Appeals simply addressed the Investment Company Act in the context of determining that Howe sought the same relief under that Act as he sought in his other causes of action, and that substantive equivalents of that relief were available in Canada. A. 20a-24a. Howe even conceded at oral argument that the Investment Company Act claims "in substance" did not make a significant difference to the case. A. 22a. The issue Howe discusses at length in his Petition simply did not arise below.[16]

Coastal Corp., 729 F.2d 1371, 1374-76 (11th Cir. 1984); *Turhoff* v. *May Co.*, 531 F.2d 1357, 1360 (6th Cir. 1976). It should also be noted that absence of a class action remedy in a foreign forum similar to the United States remedy does not bar *forum non conveniens* dismissal, since absence of a class action remedy does not constitute " 'no remedy' at all." *In re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. 842, 851 (S.D. N.Y. 1986), *aff'd in relevant part*, 809 F.2d 195 (2d Cir.), *cert. denied*, 484 U.S. 871 (1987).

[16] The sole provision of the Investment Company Act applying to foreign companies provides that such companies using the United States mails in

CONCLUSION

Respondents respectfully submit that, for the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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connection with a public offering must apply to the SEC for permission to register. 15 U.S.C. § 80a-7(d). Howe asks this Court to rule that each "redistribution" of a share on the secondary market (i.e., each sale of a share of the company's stock by someone who purchased that share in the initial offering — throughout the entire lifetime of the company) is a "public offering" for purposes of the Act which (if the United States mails are directly or indirectly involved) in turn triggers § 80a-7(d). As applied to this case, this rule would mean that Goldcorp was obligated, when it made its initial and only public offering in 1983, to seek permission from the SEC to register even though it, in all probability, was not an Investment Company (under the Act) at the time, *and* expressly refused to sell shares in the initial public offering to American residents. AA.I. 156-158; AA.II. 4-5. Not surprisingly, there is absolutely no legal support for this extraordinary view of the law. Brief for Securities and Exchange Commission as Amicus Curiae in the Court of Appeals at 30-31 n.29 (conceding that Howe had not stated a claim under the Investment Company Act).